In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1197

RICARDO PABLO BARRON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the legality of the warrantless search of his vehicle at a Border Patrol checkpoint.

After a trial without a jury in the United States District Court for the Southern District of California, petitioner was convicted of having possessed 600 pounds of marijuana with the intention of distributing it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. B).

1. The facts concerning the search of petitioner's car and the seizure of the marijuana in it were not disputed and are summarized in the opinion below. Petitioner, the sole occupant of a 1963 Oldsmobile, stopped his car at 1:40 a.m. on August 15, 1971, at the San Clemente Border Patrol checkpoint, 67 miles north

of the Mexican border. Border Patrol Agent Bagley noticed that petitioner's car was low in the rear, although he observed nothing heavy in the back seat. Intending to search the trunk for aliens being smuggled into the country, he directed petitioner to drive into the secondary inspection area at the side of the highway. Petitioner pulled over, but then accelerated rapidly and sped off.

Agent Anaya chased petitioner's car in a Border Patrol vehicle, and when petitioner slowed down and jumped from his car into the brush one half mile from the checkpoint, Anaya chased petitioner's car on foot and stopped it. Inside the car he detected a strong odor of marijuana. After petitioner was found hiding in the brush, Agent Holman, who drove petitioner's car back to the Border Patrol office, also detected a strong marijuana odor inside the car. When the trunk of petitioner's car was opened with a key found in petitioner's pocket, it was found to be completely filled with kilo bricks of marijuana.

2. Petitioner contends that the search of the trunk of his car and the seizure therein of 600 pounds of marijuana violated his Fourth Amendment rights. As noted by the court below (Pet. App. B 45), petitioner's flight from the checkpoint and the agents' subsequent detection of a strong marijuana odor in his car constituted probable cause to search the car trunk for aliens or contraband. Therefore, if the immigration officers were authorized to stop petitioner's car at the San Clemente checkpoint, their subsequent actions, including the search of the car, were also proper.

The issue of the validity of 8 U.S.C. 1357(a)(3), which authorizes immigration officers within a reasonable distance of the border to conduct warrantless

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searches of vehicles for aliens illegally entering the country is currently before this Court in *Almeida-Sanchez* v. *United States,* No. 71-6278, argued March 28, 1973. The instant case is distinguishable from that one, since petitioner here was stopped at an established checkpoint, rather than in the course of a "roving check," and the decision to conduct a further check of his car was made on the basis of observations indicating that further investigation was desirable, not on a random or universal basis. Nevertheless, since the checkpoint is 67 miles from the border, this case also presents questions under 8 U.S.C. 1357 (a)(3). Therefore, the Court may wish to defer action on this petition pending its determination in *Almeida-Sanchez.*

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.

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